Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DENNIS F. BRADLEY,

Petitioner,

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS' AFFAIRS,

Respondent.

Appeal from the United States Court of Appeals for the Federal Circuit in 05-7192, Judge Michel, et al.

WRIT OF CERTIORARI BY PETITIONER DENNIS F. BRADLEY

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QUESTIONS PRESENTED

1. Is this Veteran in particular and Veterans, in general, being denied Due Process by the VA and the Legal System?

2. Is this Veteran in particular and Veterans, in general, being discriminated against under the XIV Amendment to the Constitution?

3. Must the law be followed, as required by 38 USC 1154(b)?

4. Is it legal for the Courts to declare the law mute in any case because a lower Court has decided the issue?

STATEMENT OF THE ISSUES

1. Was 38 USC 1154 applied in this case as required for a combat veteran?

2. Must the CAVC order 38 USC 1154 applied in this case or can it unilaterally dismiss the failure to do so as irrelevant?

3. Must it be and was 38 USC 1110 applied to this case as written?

4. Must it be and was 38 USC 7104 applied to this case?

5. Must it be and was 38 CFR 4.2 applied to this case?

6. Is "plausibility" a standard of evidence in the law?

7. Must it be and was 38 USC 5107 applied to this case?

8. Are 38 USC 7292 and 511 constitutional?

9. Was I denied "due process" in this case?

10. Was 18 USC 1962 and 9167 violated in this case?

LIST OF PARTIES

The caption contains the names of all parties to this proceeding.

PETITION FOR WRIT OF CERTIORARI

Dennis F. Bradley respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit.

OPINIONS

The opinions of the Court of Appeals for the Federal Circuit entered May 12, 2006, the Court of Appeals for Veterans Claims entered August 1, 2005 and the Denial of Rehearing entered June 6, 2006 are attached in the appendix.

STATEMENT OF RELATED CASES

Case 94-306 Court of Appeals for Veterans Claims

Case 97-910 Court of Appeals for Veterans Claims

Case 01-2014 Court of Appeals for the Federal Circuit

Case 03-658 Court of Appeals for Veterans Claims

JURISDICTION

The opinion and judgment of the Court of Appeals for the Federal Circuit were filed May 12, 2006. The denial for rehearing was filed June 6, 2006. This request has been filed within 90 days of the Denial for Rehearing.

STATUTES INVOLVED

1. Due Process clause of the United States Constitution.

2. XIV Amendment to the United State Constitution.

3. 38 USC 1154(b): In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, **the secretary shall accept as sufficient proof of service connection of any disease or injury alleged to have incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease**, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and to that end, **shall resolve every reasonable doubt in favor of the veteran**. Service connection of such injury or disease may be rebutted by **clear and convincing evidence to the contrary**. The reasons for granting or denying service connection in each case **shall be recorded in full.**

4. 38 USC 1110 "For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in the line of duty, in the active military, naval or air service, during a period of war, the United States **will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated**, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs."

STATEMENT OF THE CASE

I hereby request a Writ of Certiorari based on the following errors made by the Court of Appeals for the

Federal Circuit in case number 2005-7192 dated May 12, 2006.

1. Denial of Due Process:

In the Court's decision it stated "Due Process includes that Veterans receive adequate notice of the judicial disposition of their claim and an adequate opportunity to challenge any adverse ruling." The Court then proceeded to ignore this exact set of facts in my Appeal based on the November 1967 VA physical and new diagnosis of Recurrent Lower Back Strain, minimal disability.

2. Discrimination under the XIV Amendment:

The Court states that "The Congressional position that Veterans' claims can receive no more than three levels of factual review does not deprive Veterans of equal protection, particularly in the context of Veteran-friendly presumptions. We conclude that the review procedure is not discriminatory treatment under the Constitution." In fact, Veterans are not given one level of review of the Facts. The VARO, BVA and the CAVC are all part of the Veterans Administration which is responsible for paying disability claims.

There is a direct conflict of interest on the part of the VA in this decision process and a Denial of Due Process to the Veteran in that the facts of the case are never considered by a disinterested party. Two or more lawyers for the BVA have been sent to prison for destroying evidence favorable to the Veteran. Time and time again the VA Regional Office has denied service connection for my claims even though every piece of evidence is either neutral or on my side. This hardly constitutes a review of the facts.

3. The Court found that they are prohibited from addressing my claim in regards to 38 USC 1154(b).

The Court incorrectly looked at this claim as being a question of how the law was applied and not if the law was applied, as required. The CAVC in the decision for case 03-658 (page 6) states "Thus, even had section 1154(b) been applied in this case, it would demonstrate only the in-service incurrence of his disability." The CAVC admits that 38 USC 1154(b) was not applied to the decision making process.

4. The denial of my claim under 38 USC 1110 based on the fact that the BVA had already addressed this issue in its 1997 decision.

FACTS

1. 38 USC 1110 has not been repealed. 38 USC 1110 does state "the United States will pay to any Veteran thus disabled compensation as provided in this subchapter."

2. Nowhere in the Constitution is the right given to any branch of the government to ignore the law for any reason, let alone the oversight of a doped up, disabled Veteran who is denied legal representation at this point in the claims process. The Supreme Court has held that the state must provide a lawyer for indigents both in the criminal and civil courts. The law denies legal representation to the very people that guarantee the Supreme Court's existence, **Veterans**.

REASONS FOR GRANTING THE WRIT

1. The VA benefits system has become an adversarial system and Veterans are denied representation at the first two levels for checking the facts.

2. Veterans are denied any review of the facts by a disinterested court.

3. Veterans deserve the same rights as all other citizens.

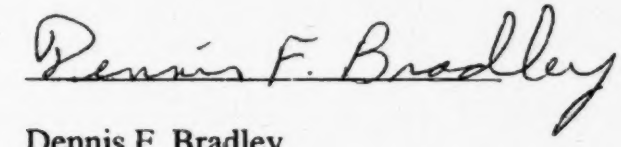
4. Failure to apply the law, by any court, cannot be tolerated.

CONCLUSION

Veterans are being denied their rights by the VA and the Supreme Court must take this chance to guarantee that the Veterans that guarantee the very existence of this court and this country are treated fairly under the law. The question of how much it will cost the Federal Government can no longer be the prime factor in this decision process.

Dated: June 27, 2006

Respectfully submitted,



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Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 03-658

DENNIS F. BRADLEY, APPELLANT

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENE, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

GREENE, *Judge:* The veteran, Dennis F. Bradley, appeals, pro se, a March 17, 2003, decision of the Board of Veterans' Appeals (Board) that (1) denied an initial disability rating higher than 40%, before November 12, 1997, for his VA service-connected degenerative disc disease of the lumbar spine; (2) determined that there was no clear and unmistakable error (CUE) in an August 1967 VA regional office (RO) decision that denied service connection for a back injury; and (3) denied an effective date earlier than April 23, 1990, for his service-connected degenerative disc disease of the lumbar spine. Record (R.) at 4-5. In his brief, Mr. Bradley argues, inter alia, that the August 1967 RO decision failed to consider sections 1110 and 1154(b) of title 38, U.S. Code. Appellant's Brief (Br.) at 1-7. This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski,* 1

Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the March 17, 2003, decision of the Board.

I. FACTS

Mr. Bradley served on active duty in the U.S. Army from November 1959 to September 1962 and from August 1964 to June 1967, including service in Vietnam. R. at 27-28. His March 1967 discharge examination report contained a notation of "[d]iagnosed as degen[erative] disc disease." R. at 80. In a July 1967 VA orthopedic examination report, a VA physician noted that "[Mr. Bradley] g[a]ve[] a history of injury to his back while in the service" and that "[the i]njury occurred in 1964, while lifting heavy boxes." R. at 100. The physician concluded with a diagnosis of "[d]egenerative[] disc disease, not found." *Id.* A July 1967 VA radiographic report contained an impression of "[n]egative lumbar spine." R. at 103. The August 1967 RO decision denied service connection for degenerative disc disease and noted that "[d]egenerative disc disease was not found." R. at 112. Mr. Bradley filed a Notice of Disagreement (NOD) as to that decision in September 1967 (R. at 114), but he did not file a Substantive Appeal (*see* R. at 1-1302).

In March 1994, the Board awarded Mr. Bradley service connection for a low-back disorder. R. at 243-44. His condition subsequently was assigned a 10% rating in April 1994. R. at 254-57. In reaching this determination, the Board "conclude[d] that a valid basis exists for finding that intermittent and progressive low[-]back symptomatology over the years are the residuals of the low[-]back injury during active duty." R. at 243. The Board also determined that the August 1967 RO decision was not the product of CUE. *Id.* Mr. Bradley then appealed as to the issue of CUE (R. at 259, 527-29), and in July 1996, the Court vacated the March 1994 Board decision and remanded the CUE matter for readjudication (R. at 592-93). In so doing, the Court held that the August 1967 RO decision has erred in "den[ying] the

very existence of the evidence" showing that Mr. Bradley's back condition had been noted on examination at the time of his discharge from his second period of service. R. at 592 (quoting *Russell v. Principi*, 3 Vet.App. 310, 319 (1992) (en banc)); *see* R. at 80 (discharge examination report). The Court remanded the matter for a determination of "whether, had the error . . . not been made in the 1967 RO adjudication and had the RO considered the finding of in-service back injury on [Mr. Bradley's] discharge examination, the outcome would manifestly have been changed." R. at 592 (citing *Mason v. Brown*, 8 Vet.App. 44, 52-53 (1995), and *Russell, supra*).

On remand, the Board, in a March 1997 decision, stated that, "[a]lthough the RO obviously erred in its discussion of the facts regarding [Mr. Bradley's] separation examination report, the Board finds that the result would not have been manifestly different but for the error." R. at 978. The Board further found that, "[a]lthough there was some evidence of degenerative disc disease . . . in service, degenerative disc disease . . . w[as] essentially ruled out in the July 1967 VA examination." *Id.* The Board thus concluded that there was no CUE in the August 1967 RO decision. R. at 979. Mr. Bradley then filed a motion for reconsideration with the Board, which was denied in June 1997. R. at 1022-27.

In January 1998, the RO, after it had received additional evidence (including a November 12, 1997, VA medical record containing a diagnosis of "[s]evere [d]isc [h]erniation at L1-L2," and another containing a notation of"[s]evere pain in lower back radiating in both legs" (Supplemental (Suppl.) R. at 4)), increased Mr. Bradley's rating for his low-back disorder to 40%, with an effective date of April 23, 1990 (which is also the effective date of the award of service connection), and to 60%, with an effective date of November 12, 1997. R. at 1040. He subsequently

filed an NOD as to that decision. R. at 1048-49. In January 2001, Mr. Bradley again alleged to the RO that the August 1967 RO decision was the product of CUE. R. at 1203. In a November 2001 decision, the RO determined that there was no CUE in the August 1967 RO decision (R. at 1255), and Mr. Bradley appealed (R. at 1279-85).

In the March 2003 decision on appeal, the Board concluded that, although the evidence showed that Mr. Bradley had degenerative disc disease and low-back pain as far back as 1992, that evidence did not show that the criteria for a rating of 60% were met prior to November 12, 1997. R. at 15. The Board also considered the issue of functional loss due to pain:

> With respect to [Mr. Bradley's] entitlement to an increased evaluation under 38 C.F.R. §§ 4.40, 4.45, and 4.59, the Board has also considered whether an increased evaluation could be assigned on the basis of functional loss due to [his] subjective complaints of pain. *See DeLuca v. Brown*, 8 Vet.App. 202, 204-205 (1995); VAOPGCPREC 36-97, 63 Fed. Reg. 31,262 (1998). However, [although] the evidence shows a limitation of motion in the lumbar spine, as well as chronic pain, the evidence does not otherwise show functional loss due to pain to warrant a rating in excess of 40[%] prior to November 12, 1997. In particular, the Board notes the lack of evidence of such findings as neurological impairment or muscle atrophy, and findings of strength of 4/5 or greater in the lower extremities. The Board therefore concludes that the evidence does not show that there is functional loss due to pain to warrant a rating in excess of 40[%] prior to November 12, 1997. 38 C.F.R. §§ 4.40, 4.45; *DeLuca, supra.*

R. at 16. Additionally, the Board addressed whether other diagnostic codes (DCs) could potentially be applied to Mr. Bradley's disorder.

> The Board has considered the possibility of a rating in excess of 40[%] prior to November 12, 1997[,] under other potentially applicable [DCs]. *See Schafrath v. Derwinski*, 1 Vet.App. 589 (1991). However, [Mr. Bradley] received a 40[%] rating for his low[-]back disorder effective from the date of service connection until November 12, 1997. This is the maximum rating allowed under 38 C.F.R. § 4.71a, [DCs] 5292 and 5295. As for other codes, in order to warrant an evaluation in excess of 40[%] under [DC] 5289, [Mr. Bradley] would have had to demonstrate that his spine was ankylosed (complete bony fixation) at an unfavorable angle. However, [the evidence of record does not show] ankylosis of the lumbar spine.

R. at 16.

As to the issue of CUE in the August 1967 RO decision, the Board first stated that, "to the extent that [Mr. Bradley] argues that the RO failed to apply 38 U.S.C. [] § 1154(b), this argument was not before th[e] Board at the time of its March 1997 denial of his CUE claim" and therefore "this aspect of his CUE claim is considered to be a new claim." R. at 18. The Board also found that, "to the extent that [Mr. Bradley] currently argues that the RO failed to correctly apply 38 U.S.C. § 1110, this argument had been made and was within the scope of the arguments addressed in the Board's March 1997 decision." *Id.* The Board then determined that there was no CUE in the August 1967 RO decision, concluding that, "even if participation in combat had been shown [and section 1154(b) applied], the RO would still have had a rational basis for denying his claim, [because]

the most recent medical evidence of record indicated that he did not have the claimed condition." R. at 21.

II. ANALYSIS

A. Higher Initial Disability Rating

The degree of disability under the VA schedule for rating disabilities is a finding of fact subject to the "clearly erroneous" standard of review. *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). A finding of fact is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Gilbert*, 1 Vet.App. at 52. When applying this standard, "if there is a 'plausible' basis in the record for the factual determinations of the [Board], . . . [the Court] cannot overturn them." *Gilbert, supra.* In assigning an initial rating following an initial award of service connection, VA must consider all evidence of record from the time of the veteran's application for service connection. *See Fenderson v. West*, 12 Vet.App. 119, 126 (1999).

In this case, although the Board noted that there was some evidence of neurological involvement (one of the criteria under the applicable 60% rating) prior to 1997, the Board also found that the evidence did not meet the criteria for the 60% rating prior to 1997. R. at 15. The Court concludes that the Board had a "plausible basis" for this determination. *Gilbert, supra.* The Board first noted that, under the then applicable rating criteria, a 60% rating was warranted for intervertebral disc syndrome (IDS) "pronounced, with persistent symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to the site of the diseased disc, little

intermittent relief." R. at 12 (citing 38 C.F.R. § 4.71a, DC 5293 (2001)). The Board then concluded, after a thorough review of the evidence of record, that "[t]he findings [prior to the November 12, 1997, VA medical examination report (Suppl. R. at 4)], to include neurological, sensory and deep tendon reflex findings, do not show pronounced IDS, nor is pronounced IDS shown by the other findings of record." R. at 15. The Court cannot find, nor does Mr. Bradley refer to, any evidence of record that demonstrates the existence of pronounced IDS, as required by the applicable DC, prior to November 1997. *See, e.g.,* R. at 482 (September 1994 VA medical examination report containing diagnosis of "[c]hronic low[-]back pain" with "some loss in lumbar range of motion, secondary to pain, but no major functional deficit"), 612-14 (private physician progress notes from March 1993 through February 1994 describing mild-to-moderate low-back pain with "some improvement"). Therefore, the Board's decision denying an increased initial rating for Mr. Bradley's service-connected degenerative disc disease of the lumbar spine will be affirmed.

B. CUE

Section 3.105(a) of title 38, Code of Federal Regulations, provides in pertinent part "[P]revious determinations which are final and binding . . . will be accepted as correct in the absence of [CUE]. Where evidence establishes such error, the prior decision will be reversed or amended." *See* 38 U.S.C. § 5109A; *Cook v. Principi*, 318 F.3d 1334 (Fed. Cir. 2002) (en banc), *cert. denied*, 539 U.S. 926 (2003). For CUE to exist, either (1) the correct facts in the record were not before the adjudicator or (2) the statutory or regulatory provisions extant at the time were incorrectly applied. *See Damrel v. Brown*, 6 Vet.App. 242, 245 (1994). In addition, "the error must be 'undebatable' and of the sort 'which, had it not been made, would have manifestly changed the outcome at the time it was made." *Id.*

(quoting *Russell*, 3 Vet.App. at 313-14); *see Bustos v. West*, 179 F.3d 1378, 1380 (Fed. Cir. 1999) (expressly adopting "manifestly changed the outcome" language of *Russell, supra*). "In order for there to be a valid claim of [CUE], . . . [t]he claimant, in short, must assert more than a disagreement as to how the facts were weighed or evaluated." *Russell*, 3 Vet.App. at 313. That is because, "even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, ipso facto, clear and unmistakable." *Fugo v. Brown*, 6 Vet.App. 40, 43-44 (1993). The Court's review of a Board decision concerning CUE in prior decisions is limited to whether the Board's conclusion was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," under 38 U.S.C. § 7261(a)(3)(A), and whether the decision is supported by an adequate statement of reasons or bases, under 38 U.S.C. § 7104(d)(1). *See Russell*, 3 Vet.App. at 315.

In this case, Mr. Bradley raises arguments regarding the application by the RO in 1967 of 38 U.S.C. §§ 1110 (Appellant's Br. at 1, 5) and 1154(b) (Appellant's Br. at 1-6). With regard to his arguments regarding section 1110, as the Board correctly noted, these arguments previously were addressed in a final Board decision in March 1997, R. at 978-79. Therefore, these arguments are foreclosed as an avenue of demonstrating CUE in the 1967 RO decision. *See Corwin v. Principi,* 18 Vet.App. 246, 248 (2004) (per curiam order); *Bissonnette v. Principi,* 18 Vet.App. 105, 112 (2004).

Concerning Mr. Bradley's contention that section 1154(b) was not properly applied, the evidence of record, as detailed by the Board, regarding his claim at the time of the August 1967 RO decision is, at best, equivocal. *See* R. at 80, 100, 103. Thus, even had section 1154(b) been applied in this case, it would demonstrate only the in-service incurrence of his disability; this Court has previously held that section

1154(b) does not alter the fundamental requirements of a current disability or medical nexus to service. *See Libertine v. Brown*, 9 Vet.App. 521, 523-24 (1996); *Caluza v. Brown*, 7 Vet.App. 498, 507-08 (1995). Even assuming that Mr. Bradley's discharge diagnosis of degenerative disc disease could suffice to be some evidence of the other two elements of a current disability or a medical nexus to service for service connection, the evidence of record at the time is at best equivocal as to current disability, *See* R. at 100 (July 1967 VA special orthopedic examination with diagnosis of "[d]egenerative [] disc disease[] not found"), 103 (July 1967 VA radiographic report with impression of "[n]egative lumbar spine"). Hence, regardless of any deficiencies in the August 1967 RO decision, Mr. Bradley cannot demonstrate that the outcome of that decision would have been manifestly changed absent any purported adjudicative errors. *See Russell*, 3 Vet.App. at 313-14; *Bustos, supra.* Mr. Bradley's remaining contentions are without merit, and the Court will not address them.

The Court thus concludes that the 2003 Board decision that the August 1967 RO decision did not contain CUE is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and is supported by an adequate statement of reason or bases. *See Russell,* 3 Vet.App. at 315. Furthermore, the Court will dismiss Mr. Bradley's March 10, 2004, motion for summary judgment, as it is now moot.

III. CONCLUSION

Upon consideration of the foregoing, Mr. Bradley's March 2004 motion for summary judgment is dismissed, and the March 17, 2003, Board decision is AFFIRMED.

DATED: MAR 15 2005

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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

05-7192

DENNIS F. BRADLEY,

Claimant-Appellant,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs

Respondent-Appellee.

DECIDED: May 12, 2006

Before MICHEL, Chief Judge, NEWMAN and MAYER, Circuit Judges.

NEWMAN, Circuit Judge.

Mr. Dennis F. Bradley appeals from the decision of the Court of Appeals for Veterans Claims[1] holding that the Board of Veterans Appeals did not commit clear and unmistakable error (CUE) in deciding Mr. Bradley's claim. Because the Court of Appeals for Veterans Claims applied the correct legal standard, because no constitutional violation has been shown, and this court does not possess jurisdiction to review the application of the legal standard to the facts of a particular case, the judgment is affirmed.

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[1] Bradley v. Nicholson, No. 03-658, (C.A.V.C. August 1, 2005) (judgment); (March 15, 2005) (memorandum opinion).

BACKGROUND

Mr. Bradley served two tours of active duty in the Army, from November 1959 to September 1962 and from August 1964 to June 1967, including service in Vietnam. He was diagnosed with degenerative disk disease in his March 1967 discharge examination. X-ray examination at that time revealed a minimal but definite narrowing of the L4-L5 intervertebral space.

At a physical examination in July 1967, a VA physician attributed the disk injury to Mr. Bradley's lifting heavy boxes on detail, for Mr. Bradley stated that he performed this task. The diagnosis was "negative [for] lumbar spine [disease]" and that "degenerative disk disease was not found," contrary to the March 1967 diagnosis. The Regional Office (RO) denied service connection for back injury in August 1967. Mr. Bradley filed a Notice of Disagreement in September 1967 but did not file an appeal to the Board of Veterans Appeals.

In March 1994, on Mr. Bradley's request for review, the Board found that "intermittent and progressive low back symptomatology over the years are the residuals of the low back injury during active duty," and he apparently was given a 20% disability rating by the RO in November 1994. However, the Board determined that the 1967 decision of the RO was not clear and unmistakable error, and did not warrant a retroactive effective date. Mr. Bradley appealed this ruling.

The Court of Appeals for Veterans Claims vacated the March 1994 Board decision, and remanded for determination of whether the outcome would have been different if consideration had been given to the March 1967 diagnosis of in-service back injury. On remand the Board acknowledged that it was error not to have taken the discharge diagnosis into account, but stated that "the result would not have been manifestly different but for the error"

because the July 1967 physician had disagreed with the March 1967 discharge diagnosis, and it was not CUE for the RO to have relied on the later examination. Thus the Board held that there was not clear and unmistakable error in the 1967 RO decision.

At a medical examination on November 12, 1997, the medical officer diagnosed a "severe" disk herniation at L1-L2, the lumbar spine, with "severe pain in lower back radiating to both legs." Consequently, the RO increased Mr. Bradley's disability rating to 40% retroactive to April 23, 1990, and to 60% effective November 12, 1997. Mr. Bradley filed a Notice of Disagreement as to this decision, seeking both a higher rating and an earlier effective date.

Mr. Bradley filed another claim in January 2001, asserting CUE in the August 1967 RO decision. In November 2001 the RO determined that there was no CUE in the earlier decision. On appeal to the Board, in March 2003 the Board held that although there was evidence of degenerative disk disease and low-back pain as far back as 1992, Mr. Bradley did not meet the criteria for a 60% disability rating until November 12, 1997, even taking into account functional loss due to pain. The Board stated that Mr. Bradley's argument that the RO failed to apply 38 U.S.C. §1154[2] was not raised in a timely fashion, but that even applying §1154, "the RO would still have had a rational basis for denying his claim, [because] the most recent medical

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[2] **38 U.S.C. §1154(b).** In the case of any veteran who engaged in combat with the enemy in active service . . . the Secretary shall accept as sufficient proof of service-connection [evidence without official record and] shall resolve every doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary.

evidence of record indicated that he did not have the claimed condition."

Mr. Bradley again appealed to the Court of Appeals for Veterans Claims. The court affirmed that there was no evidence of intervertebral disk syndrome prior to November 1997. Mr. Bradley argued that the Board had failed to apply 38 U.S.C. §§1110 and 1154(b). Regarding §1110 ("the United States will pay to any veteran thus disabled . . . compensation as provided in this subchapter"), the court held that this compensation had already been addressed in the Board decision of March 1997. Regarding §1154(b), the Board held that even if the discharge diagnosis provided evidence of service-connection, a disability rating requires the existence of actual disability at the effective date of the rating. Since the physician found that Mr. Bradley's back did not show degenerative disk disease at the time of his medical examination in July 1967, the Court of Appeals for Veterans Claims found that Mr. Bradley did not meet the requirements for a 60% disability rating in 1967 even applying §1154; that is, that the result would be the same on the standard of §1154. This appeal follows.

DISCUSSION

This court has jurisdiction to review appeals from the Veterans Court regarding "the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. §7292(c). However, this court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. §7292(d)(2). The government argues that none of the criteria for review is met. Mr. Bradley presents various arguments to bring this appeal within our jurisdiction.

A

Mr. Bradley first contends that the RO failed to apply 38 C.F.R. §4.2, which explains that different examiners may describe the same disability using different language. Mr. Bradley points out that the July 1967 physician examination reported "pain on motion" and the November 1967 examination reported "recurrent lower back strain – minimal disability," although both examinations concluded that there was not degenerative disk disease. He argues that this was CUE, and that the RO should have made a decision of disability based on the finding of lower back strain.

Mr. Bradley also contends that the RO failed to apply the presumption, established by 38 U.S.C. §1154(b), that service-connection exists for an injury to a combat veteran unless the connection is rebutted by clear and convincing evidence. In addition, Mr. Bradley argues that the RO failed to apply 38 U.S.C. §1110, which provides for compensation for veterans who sustained or aggravated injuries in service. He states that modern MRI technology would have been able to detect the degenerative disk disease which was not apparent using the X-ray equipment of 1967.

All of these arguments involve the application of law to fact, and are excluded from our appellate jurisdiction. Moreover, the issue of the application of 38 U.S.C. §1110 is the subject of a separate final unappealed Board decision and on that basis is not reviewable on this appeal. See 38 U.S.C. §7105(c) (determination becomes final unless a notice of disagreement is filed).

B

Mr. Bradley next argues that the Court of Appeals for Veterans Claims applied an incorrect legal standard for 38 U.S.C. §1154(b), in its holding that there was "plausible evidence" supporting the Board's decision. We do not have authority to review the Board's factual findings or to

determine the weight and plausibility and probative value of the evidence on which the findings were based. However, to the extent that Mr. Bradley argues that the Veterans Court applied the incorrect legal standard of review under 38 U.S.C. §7261(a)(4), we do have jurisdiction but discern no such error. See Lennox v. Principi, 353 F.3d 941, 946 (Fed. Cir. 2003).

C

Mr. Bradley argues that the statutes providing that the Federal Circuit cannot review factual findings in veterans cases, 38 U.S.C. §§511, 7292, are in violation of the equal protection guaranty of the Fifth and Fourteenth Amendments of the Constitution. He states that because the Court of Appeals for the Federal Circuit has jurisdiction to review factual findings in other areas of its jurisdiction, it discriminates against veterans to limit Federal Circuit review in veterans cases.

Challenges to governmental violation of the equal protection clause are reviewed to ascertain whether the challenged action is reasonably related to a rational government interest. When the challenge includes an assertion of discrimination, particularly against a class that has historically been discriminated against, the action receives heightened scrutiny. Compare Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955) (regulation of opticians reviewed for rational basis) with Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (race-based classifications are subject to strict scrutiny and are reviewed to determine whether they are narrowly tailored to further compelling government interests).

The statute establishing the paths of judicial review of veterans' claims is tied to the several levels of review provided by the regional office, the Board of Veterans Appeals, and the Court of Appeals for Veterans Claims; all

of these tribunals can review the factual foundations of a veteran's claim. The Federal Circuit, however, has been assigned only limited statutory and constitutional review. See Forshey v. Principi, 284 F.3d 1335, 1345 n.7 (Fed. Cir. 2002) (discussing legislative history). The congressional position that veterans' claim can receive no more than three levels of factual review does not deprive veterans of equal protection, particularly in the context of veteran-friendly presumptions. We conclude that the review procedure is not discriminatory treatment under the Constitution.

D

Mr. Bradley states that VA physicians ignored some of the information he presented to them, that some of his medical records are missing, that he was not given the benefit of the doubt as required by 38 U.S.C. §5107(b), and that other administrative deficiencies represent a failure of due process. These concerns all reflect his challenge to the resolution of factual questions; we do not possess jurisdiction to review individual factual determinations.

Due process includes that veterans receive "adequate notice of the judicial disposition of their claim and an adequate opportunity to challenge an adverse ruling." Eastern Paralyzed Veterans Assoc. v. Principi, 257 F.3d 1352, 1359 (Fed. Cir. 2001). The regional office, the Board, and the Court of Appeals for Veterans Claims have reviewed Mr. Bradley's claim; there is no issue of notice or opportunity to challenge. We discern no failure of due process in the proceedings with respect to Mr. Bradley.

E

Finally, Mr. Bradley argues that the government violated the RICO statutes, 18 U.S.C. §1961 et seq., by conspiring to deprive him and similarly situated veterans of their just disability compensation. Mr. Bradley has not presented a prima facie case of RICO violation, even if all

disputed facts are resolved in his favor, for the procedures in this administrative and judicial history do not support an allegation of racketeering influence. The matters here at issue relate to findings on the merits of his claim, in the various administrative and judicial tribunals serving veterans. As we have explained, the Federal Circuit cannot review these findings, for the issues all are factual in nature or involve the application of law to fact.

Each party shall bear its costs.

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before Michel, Chief Judge, Newman, Circuit Judge, and Mayer, Circuit Judge.

A petition for rehearing having been filed by the Appellant,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on July 3, 2006.

FOR THE COURT,

s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 06/05/2006

cc: Dennis F. Bradley
Jeffrey S. Pease

BRADLEY V DVA, 2005-7192
(CVA-03-658)

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APPEALS FOR THE
FEDERAL CIRCUIT
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CLERK